

Internal Revenue Service
memorandum

CC:TL:Br3

NSVozar/CTSanderson

TL-N-7654-91
CC:TL:Br3 Vozar/Coe

date: SEP 9 1991

to: Richard E. Trogolo, District Counsel CC:CIN

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject:

[REDACTED] v. U.S.,
Docket No. [REDACTED] (S.D. Ohio)

Request for Advice re: Assessments Against [REDACTED]
[REDACTED] for Taxable Years [REDACTED]

This is in response to your request for advice from the Tax Litigation Division regarding assessments against [REDACTED] for the taxable years [REDACTED] and [REDACTED]. We understand that you have solicited our advice because our office has jurisdiction over the above captioned refund suit for those taxable years on behalf of the Office of Chief Counsel.

We also understand that your request was prompted by separate requests from the IRS Examination Division and from the Collection Division in Cincinnati. According to your request, the IRS Examination Division has asked whether tax shown on a protective claim return filed by the [REDACTED] for the taxable year [REDACTED] should be assessed, and the Collection Division has asked whether tax assessed against [REDACTED] for [REDACTED] (as well as [REDACTED]) can or should be abated. The concern raised by Collection revolves around the onerous periodic reporting requirements for large cases in the collection inventory. (There is currently a collection freeze in place with regard to those years.) We further understand that you have instructed the Examination and Collection Divisions to defer any assessment action with respect to the taxable year [REDACTED] or abatement action with respect to the taxable years [REDACTED] and [REDACTED], pending notification of our views with regard to these matters.¹

¹ Although your request for advice references a request from the Collection Division as to whether tax assessed against [REDACTED] for the taxable year [REDACTED] can or should be abated, we note that your request was limited to the taxable years at issue in our refund suit, [REDACTED] and [REDACTED], and further note that we have been furnished with no information with respect to the taxable year

ISSUES

1. Whether it is advisable for the Service to abate an assessment of income tax against [REDACTED] for the taxable year [REDACTED].
2. Whether liabilities reflected on protective claim returns filed by [REDACTED] relative to the taxable year [REDACTED] should be assessed at all.

CONCLUSIONS

Based upon the facts as we understand them, it appears that the statute of limitations as to the separate taxable years [REDACTED] and [REDACTED] (if indeed separate returns were required) for [REDACTED] may have expired, and any appropriate abatements of assessment should be made. However, consideration should be given as to whether the doctrine of equitable estoppel might bar such a conclusion. We note that further factual investigation will be necessary to make such a determination, and strongly recommend that you request supplemental advice as to whether estoppel or some similar theory would apply. Furthermore, any extensions and consents (including those by [REDACTED]) concerning the relevant years should be analyzed to see if they have the effect of extending the statute for any separate taxable years.

Until a final determination has been made as to whether [REDACTED] should have filed separate returns, no refunds should be made under the protective claims filed on behalf of [REDACTED]. Even if a determination is made that [REDACTED] should have filed separate returns, no refunds should be made without considering the appropriate refund rules, including those in the consolidated return regulations, and without coordination with this office and the Department of Justice.

FACTS

By way of background, we will first present the relevant facts with respect to the above captioned refund suit ("the [REDACTED] refund litigation.") Unless otherwise noted, these facts were ascertained in the course of our

[REDACTED]. Accordingly, we will provide advice with respect to the taxable years [REDACTED] and [REDACTED] in this letter, and suggest that you consider whether an additional request for advice with respect to the taxable year [REDACTED] is appropriate.

involvement with this litigation. We will then present the relevant facts as we understand them in connection with your request for advice with respect to the [REDACTED] assessments.

[REDACTED] Consolidated Returns [REDACTED]

[REDACTED] and [REDACTED]

On [REDACTED], and [REDACTED], the plaintiff [REDACTED] (" [REDACTED] ") filed consolidated [REDACTED] income tax returns on Forms 1120L for the taxable years ended [REDACTED], and [REDACTED], respectively. The returns included as subsidiaries within the affiliated group the plaintiff [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] "), the latter only for the periods after [REDACTED].

The Examination Division of the Internal Revenue Service ("the Service") made certain adjustments and secured agreements from the plaintiffs and [REDACTED]² to deficiencies for the [REDACTED] and [REDACTED] taxable years. The Commissioner determined that the plaintiffs and [REDACTED] had tax deficiencies of \$ [REDACTED] for the [REDACTED] taxable year and \$ [REDACTED] for the [REDACTED] taxable year. On [REDACTED], the plaintiffs and [REDACTED] paid the tax deficiency for the [REDACTED] taxable year in full, along with interest of \$ [REDACTED]. On [REDACTED], the plaintiffs and [REDACTED] paid the tax deficiency for the [REDACTED] taxable year in full, along with interest of \$ [REDACTED].

[REDACTED] Refund Litigation ([REDACTED] and [REDACTED])

On [REDACTED], the plaintiffs [REDACTED] timely filed amended Forms 1120L for their [REDACTED] and [REDACTED] taxable years. For the [REDACTED] taxable year, the plaintiffs

² Based upon the information you provided us, it is our understanding that the assessment statute for the consolidated return had been extended to [REDACTED], by agreement. Although we have attempted to locate a copy of the Form 870 mentioned on page one of your request for advice, we have been advised that neither you nor the Department of Justice attorney currently in possession of the files for the [REDACTED] refund litigation have been able to locate the document. This extension must be examined before a final determination as to the statute of limitations can be made. See Treas. Reg. § 1.1502-77(c)(2).

claimed a refund of Federal income tax paid of \$ [REDACTED], plus interest of \$ [REDACTED], and further interest as provided by law. For the [REDACTED] taxable year, the plaintiffs claimed a refund of Federal income tax paid of \$ [REDACTED], plus interest of \$ [REDACTED], and further interest as provided by law. [REDACTED] was excluded from the plaintiffs' claims for refund, on the theory that it was not includible in the plaintiffs' affiliated group.

[REDACTED] refund suit was filed on behalf of the plaintiffs on [REDACTED]. One of the issues in that refund litigation is whether [REDACTED] was a member of the plaintiffs' affiliated group as defined in I.R.C. § 1504³. The plaintiffs alleged in their complaint that, inter alia, [REDACTED] was not properly included in the [REDACTED] and [REDACTED] returns since it was not a member of the affiliated group for consolidated return purposes. Whether [REDACTED] was included in the group depends on the status of certain participating policies as stock of [REDACTED]. Accordingly, we have advised the Department of Justice that the government should not concede the affiliation issue at this time. Furthermore, since none of the claimed refund relates to the disaffiliation issue, we have also recommended that the Department of Justice file a motion to dismiss the disaffiliation issue for lack of jurisdiction⁴.

Separate Returns and Claims for Refund

Based upon the information you furnished to us, it appears that on [REDACTED], [REDACTED] filed separate company returns for the taxable years [REDACTED] and [REDACTED], reflecting no tax due or overpayments, and that on [REDACTED], [REDACTED] filed amended Forms 1120L, claiming refunds of Federal income tax paid of \$ [REDACTED] and \$ [REDACTED], respectively, for the taxable years [REDACTED] and [REDACTED].

³ Unless otherwise indicated, section references throughout are to the Internal Revenue Code of 1954, as amended, and in effect during the years at issue.

⁴ The Department of Justice attorney handling the [REDACTED] refund litigation has advised us informally that he has not yet filed a motion to dismiss for lack of jurisdiction on the affiliation issue. He has apprised the taxpayer of our position, and has suggested that the taxpayer voluntarily dismiss with respect to the affiliation issue, file a separate action for [REDACTED], and then merge it with the [REDACTED] refund litigation.

In your request for advice, you note that the tax shown on the [REDACTED] protective claim return for [REDACTED] was assessed by the IRS Service Center. You also state that the tax shown on the [REDACTED] protective claim return filed by [REDACTED] has not yet been assessed.

DISCUSSION

Treas. Reg. § 1.1502-75(g)(1) provides:

(g) Computing periods of limitation - (1) Income incorrectly included in consolidated return. If -

(i) A consolidated return is filed by a group for the taxable year, and

(ii) The tax liability of a corporation whose income is included in such return must be computed on the basis of a separate return (or on the basis of a consolidated return with another group),

then for the purpose of computing any period of limitation with respect to such separate return (or such other consolidated return), the filing of such consolidated return by the group shall be considered as the making of a return by such corporation.

The result in the above regulation is also mandated by several cases. See, e.g., Central Data Systems v. Commissioner, 86 T.C. 157 (1986); General Manufacturing Corp. v. Commissioner, 44 T.C. 513 (1965); Atlas Oil and Refining Corporation v. Commissioner, 22 T.C. 552 (1954), acq., O.M. 10585.

In your request for advice, you specifically ask whether General Manufacturing supports the proposition that the [REDACTED] assessment against [REDACTED] should be abated on the theory that the statute of limitations on assessment of the [REDACTED] liability expired with the [REDACTED] consolidated return statute on [REDACTED], prior to the time the separate [REDACTED] return was assessed. As you note in your advice, this argument, if valid, would appear to preclude assessment of the [REDACTED] protective claim returns as well. You also express a concern that if the court in the [REDACTED] refund litigation determines that [REDACTED] was indeed a separate taxable entity for [REDACTED] and [REDACTED] the Service might be precluded from assessing separate entity liabilities which had been previously unassessed ([REDACTED] or abated ([REDACTED]), due to the running of the ordinary I.R.C. § 6501 statute of limitations on the [REDACTED] returns.

In General Manufacturing, the court determined that petitioner, who had filed consolidated returns, did not have the privilege of making consolidated returns since it failed to comply with the statute and regulations. Alternatively, the petitioner maintained that the return filed, even if invalid as a consolidated return, was nevertheless valid as a separate return of the petitioner and, therefore, started the statute of limitations running, which statute had expired before the issuance of the statutory notice of deficiency. On this point, the court said:

Numerous cases decided by this and other courts hold that in order to start the running of the assessment period a return need not be perfectly accurate or complete, or even filed on the form prescribed, if it is filed in substantial compliance with the requirements for a return. . . . Moreover, there are many cases holding that a consolidated return, filed in good faith and making a substantial disclosure of items of income, deductions, credits, and other necessary information to permit computation and assessment of tax for each member of the affiliated group, is the return of each constituent corporation of the consolidated group for statute of limitations purposes with respect to assessment. . . .

Here, as in several of the cases cited above, the "consolidated" return contained schedules attached to it, one for Rider and one for the petitioner. The schedules disclose the gross income, deductions, and taxable income of both corporations in such a way that the items could be readily verified and the tax computed. . . . Moreover, the respondent's revenue agent testified that the deficiency here asserted was actually computed from the information contained in the "consolidated" return and the attached schedules. . . . Therefore, the return filed obviously contained the necessary data from which the tax could be computed and assessed. Respondent was aware of the essential facts as a result of the revenue agent's audit and subsequent administrative action; and the deficiency notice could have been issued prior to January 20, 1962, viz, within the usual 3-year period from the date the return was filed. This was not done. We find no such "concealment or misrepresentation" in the return as will permit respondent to invoke the provisions of section 6501(c)(3) and thus bar the running of the 3-year statute of limitations. . . .

Id. at 523-24 (citations omitted).

An exception to the above general rule, however, has been recognized in cases where the doctrine of equitable estoppel may apply. See Central Data Systems v. Commissioner, 86 T.C. 157 (1986). Further factual investigation is needed to determine if estoppel or some similar theory may be applicable to prevent the statute of limitations under these facts from having expired.

Furthermore, any extensions or consents concerning the relevant years (including any executed by [REDACTED]) should be analyzed to determine if they have the effect of extending the statute of limitations for any separate taxable years. See Treas. Reg. § 1.1502-77(c).

Absent a claim of estoppel or an extension of the statute of limitations, applying the rules above to the facts as we understand them (based on the limited information that we have) leads to the conclusion that the statute of limitations as to the separate taxable years [REDACTED] and [REDACTED] of [REDACTED] has expired, and any appropriate abatements of assessments should be made.

However, a final determination has not been made as to whether [REDACTED] should have filed separate returns. Until such a determination is made, no refunds should be made under the protective claims filed by [REDACTED]. Even if a determination is made that [REDACTED] should have filed separate returns, no refunds should be made without considering the appropriate refund rules,⁵ including those in the consolidated return regulations, (see Treas. Reg. § 1.1502-77(a)), and without coordinating with this office and the Department of Justice attorney handling the [REDACTED] refund litigation.

RECOMMENDATION

In accordance with the foregoing, we recommend that you seek supplemental advice as to whether the doctrine of equitable estoppel or some similar theory might prevent the statutes of limitations from having expired with respect to the taxable years [REDACTED] and [REDACTED] for [REDACTED] and as to whether the statute of limitations might have been extended. In addition, you may wish to consider the appropriateness of requesting advice with respect to the taxable year [REDACTED] for [REDACTED]. We recommend that you continue to advise the Examination and

⁵ For example, is the refund claim of [REDACTED] an attempt to get around the rules against variance with respect to the [REDACTED] refund claim that is presently in litigation?

Collection Divisions to defer any assessment or abatement action with respect to the [REDACTED] and [REDACTED] taxable years for [REDACTED], pending further exploration of the estoppel theory and extension possibility, and pending a determination as to the affiliation issue in the [REDACTED] refund litigation. Certainly no refunds should be made without consulting this office. Should you have any additional questions, please call Nancy Vozar at (FTS) 566-3335.

MARLENE GROSS

By:

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